Federal Power Sdn Bhd v Dara Consultant Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-28JM-11–05 OF 2021
NADZARIN WOK NORDIN JC
11 OCTOBER 2021

Companies and Corporations — Judicial management — Applicant applied for judicial management pursuant to s 405 of Companies Act 2016 — Intervener opposed to application — Whether applicant fulfilled requirements in s 405 of Companies Act 2016 — Whether order ought to be granted — Companies Act 2016 s 405

In the originating summons ('OS') before this court, the applicant had applied for inter alia an order that the applicant be placed under judicial management in accordance with s 405 of the Companies Act 2016. The applicant was in the business of manufacturing medium and high voltage cables in Malaysia and was one of the 12 companies in Malaysia that was able to manufacture such cables. The applicant, in trying to manufacture its cables, had entered into an agreement with Accupro Sdn Bhd ('Accupro') to finance and purchase the raw material on behalf of the applicant since 2019. In financing the purchase of raw materials, Accupro had entered into facility agreements with Alliance Bank Malaysia Bhd ('Alliance Bank'). Alliance Bank in granting the facility agreements with Accupro had also entered into two tripartite deeds of assignment of proceed with Accupro and the applicant whereby the applicant consented Alliance Bank to enter a third party charge on them. Based on the management accounts as at July 2021, the applicant's total liabilities exceeded its total assets. The applicant claimed that even though the applicant was unable to pay its debts now, there was a reasonable probability of rehabilitating the applicant or of preserving all or parts of its business as a going concern or that otherwise the interest of creditors would be better served than by resorting to a winding up. Dara Consultant Sdn Bhd ('the intervener') had objected to the OS and raised the following issues, inter alia: (a) the OS did not meet the statutory threshold; and (b) failure to make full and frank disclosure.

Held, granting the order in terms of the OS in encl 1:

(1) The applicant had not misled the court in any way and the applicant had made full and frank disclosure of the entire circumstances of its case before the court which included the applicant's financial status, the current legal proceedings against them, as well as addressing the intervener's objections to the OS. The applicant had been able to satisfy the court that the criteria's referred to s 405(1)(b) of the Companies Act

2016 being that the survival of the applicant company, or the whole or part of its undertaking as a going concern or a more advantageous realisation of the applicant company's assets would be effected than on a winding up, had been met on a balance of probabilities that it was more probable than not that the criterion as set out would be fulfilled (see paras 26 & 28).

[Bahasa Malaysia summary

Dalam saman pemula ('OS') di hadapan mahkamah ini, pemohon telah memohon antara lain perintah supaya pemohon diletakkan di bawah pengurusan kehakiman mengikut s 405 Akta Syarikat 2016. Pemohon adalah dalam perniagaan perkilangan medium dan kabel voltan tinggi di Malaysia dan merupakan salah satu daripada 12 syarikat di Malaysia yang mampu membuat kabel tersebut. Pemohon, dalam percubaan untuk membuat kabelnya, telah memeterai perjanjian dengan Accupro Sdn Bhd ('Accupro') untuk membiayai dan membeli bahan mentah bagi pihak pemohon sejak 2019. Dalam membiayai pembelian bahan mentah, Accupro telah memasuki ke dalam perjanjian kemudahan dengan Alliance Bank Malaysia Bhd ('Alliance Bank'). Alliance Bank dalam memberikan perjanjian kemudahan dengan Accupro juga telah menandatangani dua surat ikatan penyerahhakan hasil tiga pihak dengan Accupro dan pemohon di mana pemohon membenarkan Alliance Bank untuk memasukkan cagaran pihak ketiga ke atas mereka. Berdasarkan akaun pengurusan pada Julai 2021, jumlah liabiliti pemohon melebihi jumlah asetnya. Pemohon mendakwa bahawa walaupun pemohon tidak dapat membayar hutangnya sekarang, terdapat kebarangkalian yang munasabah untuk memulihkan pemohon atau mengekalkan semua atau sebahagian perniagaannya sebagai usaha berterusan atau sebaliknya kepentingan pemiutang akan lebih baik daripada penggunaan penggulungan. Dara Consultant Sdn Bhd ('pencelah') telah membantah OS dan membangkitkan isu berikut, antara lain: (a) OS tidak memenuhi ambang statutori; dan (b) kegagalan untuk membuat pendedahan penuh dan terus terang.

Diputuskan, membenarkan perintah seperti dikehendaki OS dalam lampiran 1:

(1) Pemohon tidak mengelirukan mahkamah dalam apa cara sekalipun dan pemohon telah membuat pendedahan penuh dan terus terang tentang keseluruhan keadaan kesnya di hadapan mahkamah yang termasuk status kewangan pemohon, prosiding undang-undang semasa terhadap mereka, serta mengutarakan bantahan pencelah terhadap OS. Pemohon telah dapat memuaskan hati mahkamah bahawa kriteria yang dirujuk kepada s 405(1)(b) Akta Syarikat 2016 iaitu keberterusan syarikat pemohon, atau keseluruhan atau sebahagian daripada akujanjinya sebagai usaha berterusan atau realisasi yang lebih berfaedah bagi aset

A syarikat pemohon akan dilaksanakan daripada penggulungan, telah dipenuhi atas imbangan kebarangkalian bahawa adalah lebih berkemungkinan daripada tidak bahawa kriteria seperti yang ditetapkan akan dipenuhi (lihat perenggan 26 & 28).]

B **Cases referred to**

Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit [2019] 8 MLJ 473; [2018] 10 CLJ 412, HC (distd)
Biaxis (M) Sdn Bhd, Re [2020] MLJU 1188, HC (distd)
Spacious Glory Sdn Bhd v Coconut Three Sdn Bhd (previously known as Nexgram
C *Land Sdn Bhd)* [2022] 7 MLJ 76; [2020] 1 LNS 1617, HC (refd)

Legislation referred to

Companies Act 2016 ss 405(1)(b), 405, 405(5)(a)
Corporate Rescue Mechanism Rules 2018

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TJ Lee (Cheok Ng Lee Law Chambers) for the applicant.
Eddie Chuah (Pei Ning Chuang with him) (Wong & Partners) for the intervener.

Nadzarin Wok Nordin JC:

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ORIGINATING SUMMONS

[1] In the Originating Summons (OS) before this court, the applicant, Federal Power Sdn Bhd (Applicant/Company), has applied for, inter alia, an
F order that the applicant be placed under judicial management in accordance with s 405 of the Companies Act 2016.

[2] The applicant claims that it is one of the 12 companies in Malaysia who has the capability to manufacture medium and high voltage cable in Malaysia
G and is thus a public interest company. It is further claimed by the applicant that even though the applicant is unable to pay its debts now, there is a reasonable probability of rehabilitating the applicant or of preserving all or parts of its business as a going concern or that otherwise the interest of creditors would be better served than by resorting to a winding up.

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BACKGROUND OF APPLICANT

[3] The applicant is a company incorporated under the Companies Act 1965 with an address a Lot 8, Jalan Ragum 15/17, PO Box 7016, 40702 Shah
I Alam, Selangor.

[4] The applicant is a subsidiary of Federal Power Holdings Sdn Bhd, a company incorporated under the Companies Act 1965 having the same address as the applicant. One of the shareholders of the applicant is Tenaga

Nasional Bhd, the main electricity supplier in Malaysia.

[5] The applicant is in the business of manufacturing medium and high voltage cables in Malaysia and is one of the 12 companies in Malaysia that is able to manufacture such cables. These cables are mainly purchase by Tenaga Nasional Bhd.

[6] The applicant's operation and business model is capital intensive as the applicant is required to fork out large sums of monies to purchase raw material and manpower.

[7] As a result of which, the applicant, in trying to manufacture its cables, had entered into an agreement with Accupro to finance and purchase the raw material on behalf of the applicant since 2019.

[8] In financing the purchase of raw materials, Accupro had entered into facility agreements with the Alliance Bank. Alliance Bank in granting the facility agreements with Accupro had also entered into two tripartite deeds of assignment of proceed with Accupro and the Applicant whereby the applicant consented Alliance Bank to enter a third party charge on them.

[9] As of 31 July 2021, the applicant's financial status based on the management report by the applicant are as follows:

	Amount (RM'000)
Asset (As of 31 July 2021)	
Non Current Asset	12,303
Current Asset	29,385
Applicant's Total Asset	41,688
Liability (As of 31 July 2021)	
Deferred Taxation	(3,056)
Trade Payables	(46,653)
Other Payables, Accruals and Deposits	(23,072)
Received Sundry Provisions	(2,472)
Taxation	(994)
Applicant's Total Liability	(76,247)

[10] Based on the management accounts as at July 2021, the applicant's total liabilities exceeds its total assets and the applicant is currently in a net liability position of approximately RM34,559,000.

INTERVENER'S OPPOSITION

[11] In summary the intervener, Dara Consultant Sdn Bhd (intervener) has objected to the OS and raised the following issues:

(a) the OS is not bona fide;

(b) the OS does not meet the statutory threshold;

(c) there is no expert opinion and approval of the nominated judicial manager;

(d) no concrete settlement plans;

(e) proceeds have been assigned to Alliance Bank;

(f) failure to make full and frank disclosure; and

(g) the OS is an abuse of process and is frivolous and vexatious.

FINDINGS OF THE COURT

Recovery plans

[12] In order to determine whether the applicant has fulfilled the requirements in s 405 of the Companies Act 2016, this court has had to firstly examine the proposal put forth by the applicant in support of the OS in its further affidavit at encl 19, namely exh L14 which is the recovery plan (recovery plan).

[13] The recovery plans and which I quote verbatim, consist of primarily the following:

a 'to procure several sources of inflow of funds in order to meet the immediate repayment obligations of the Company and to sustain its current operations to generate further in flow of funds for further settlement of debts through a possible Scheme of Arrangement pursuant to s 366 of the Companies Act 2016';

b the potential inflow of funds include:

(i) the utilization of funds from the sale of the Company's unencumbered assets/machineries to repay its outstanding debts;

(ii) injection of funds from potential investor to repay the outstanding debt owed by the Company; and

(iii) the Company to utilize its currents fund from the on going operations of the Company

[14] This court has observed that contracts No 274 and 792 entitled

'Pembekalan dan Pengiriman Underground Cable & Conductor untuk Bahagian pembahagian, TNB' with Tenaga Nasional Bhd (TNB contracts), in exh L2 of encl 2 is the tune of approximately RM40m. I however note that by way of a deed of assignment of contract proceeds dated 7 July 2020 (DOA) between the applicant and Alliance Bank Malaysia Bhd (Alliance Bank) in exh L3 in encl 2, at cl 3 thereof read with Schedule 1 thereto, the applicant as the assignor therein has assigned absolutely 'all contract proceeds and all the assignor's rights, title and interest in and to and under the contract proceeds' to Alliance Bank. It is therefore clear from this DOA that the applicant has absolutely assigned the TNB contracts and its proceeds to Alliance Bank.

[15] On this point however, I note that TNB holds approximately 3,290,625 shares in the applicant as seen in the Suruhanjaya Syarikat Malaysia search report at exh L1 of encl 2.

[16] I have also observed in the same exh L3 in encl 2, one Accupro Sdn Bhd (Accupro) who are a supplier of raw materials to the applicant, has also assigned the same proceeds from the TNB Contracts to Alliance Bank (Accupro DOA), and that the facilities granted to Accupro by Alliance Bank were to enable the applicant to finance the costs of the raw materials.

[17] It was argued by the applicant's counsel that Alliance Bank has been served with the OS and acknowledged the same but has not come to court to object to the OS and that although the DOA has absolutely assigned the proceeds of the TNB contract to Alliance Bank but at the end of the day, it was submitted that the applicant can get more contracts in coming days and referred this court to the forecast from TNB as averred to in additional affidavit at encl 19. I have since read the said additional affidavit at encl 19 and find that in the document entitled 'Supply plan Cable CPA October (Q4) 2021 — Federal Power Sdn Bhd' and the email from TNB thereto dated 1 September 2021 as well as the email threads at exh L17 thereto is currently only a forecast and not definitive of any contract to be entered into with TNB. This is supported by the fact that the 'disclaimer' in the said email thread of 26 August 2021 expressly specifies that the same is a 'Tentative Forecast Only'. I have further observed that there is no indicative figure of any amounts in the said documents referred to.

[18] I have also read para 12(c) of the additional affidavit at encl 19 where the applicant has averred that applicant's cash flow is based on the applicant's operating capacity and that in the event if the applicant stops operating, their cash flow will be badly affected.

[19] This court has thereafter examined the alleged white knights which have been alluded to by the applicant and note that in exh L15 of encl 19, there

A is a letter dated 11 August 2021 from one Abadi Ria Sdn Bhd (Abadi Ria) addressed to the applicant, whereby Abadi Ria has made an offer to purchase 30% of the shares in the applicant in the form of convertible preference shares for the sum of RM18m to be paid in three tranches subject to a due diligence being conducted and that a cheque dated 18 January 2022 has been issued by B Abadi Ria for the sum of RM1m being the first tranche payment thereto which is to be encashed only upon the judicial management order being granted.

[20] In the further exh L16 of encl19, there is a letter dated 25 August 2021 C from one ABE Engineering Sdn Bhd (ABE) addressed to the applicant which is entitled 'Letter of offer to Purchase Federal Power Sdn Bhd's Machineries' for the sum of RM12m subject to a due diligence being conducted.

[21] I have also seen that in encl 2 at exh L9, that Federal Power Holdings D Sdn Bhd (FPH), the majority shareholder of the applicant, had in a letter dated 30 April 2021 addressed to the applicant's board of directors stated that FPH was attempting to secure a RM10m cash injection for the applicant and were in the midst of arranging with several financiers for the same, and that in a redacted letter dated 3 May 2021 purportedly by a third party intimating their E interest to purchase a sum of RM10m shares in the applicant subject again to a due diligence to be conducted after which the said third party will submit a bid.

[22] I have however also further considered encls 26–30, which affidavits F therein have been allowed to be admitted to be heard in these proceedings by this court, that two of the applicant's biggest creditors, one have agreed to support the OS, and the fact that the intervener is only a minority unsecured creditor of approximately RM2m compared to the applicant's total liability of approximately RM76m. This court has also considered the applicant's counsel G submission that the applicant was trying to get other creditors to agree with the OS but were hampered due to the Covid-19 restrictions and movement control order in place and that it would in the circumstances be better for the judicial manager himself to come in and lay out the proposal to the creditors.

H **[23]** I also agree with the applicant's counsel that the actual recovery plan is to be properly and comprehensively prepared by the proposed judicial manager upon obtaining the judicial management order (JMO). In respect of this, Justice Wong Hock Chong's had stated in *Re Biaxis (M) Sdn Bhd* [2020] MLJU 1188 as follows:

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> [14] I am of the firm opinion that the application should also be supported by the nominated judicial manager for the following reasons: (a) he is the mastermind behind the proposal and plays a key role throughout the judicial management process; (b) he has the expertise to consider whether the proposal will achieve survival and/or better realisation; (c) he is able to provide an objective view, being a

professional without any vested interest in the applicant or company; and (d) for as much as it is applicant's application for a judicial management order, it is also his application albeit indirectly to be appointed judicial manager.

[15] To this end, I think it incumbent on him to affirm an affidavit to support the application. At the very least (though not encouraged), he should prepare an expert report to support the application, to be appended to the applicant's affidavit.

[24] On the above I would like to stress that the same is not a requirement under the Companies Act 2016 or the Corporate Rescue Mechanism Rules 2018. Although I do not disagree with the Learned judicial commissioner on the same, I hold that the nominated judicial manager's affidavit is not absolutely necessary but that such an affidavit would of course be of immense assistance to the court to assess the viability of any proposals put forth to the court.

[25] This court has also noted the rate of returns which the applicant has averred to in paras 12 (f) and (g) of the applicant's additional affidavit at encl 19 whereby it was averred that in a winding up scenario, the secured creditors will get 60–80 cent per RM and the unsecured creditors, nothing, whilst in a judicial management scenario, there will be RM1 for each secured creditors and 10–15 cent for the unsecured creditors.

[26] Finally, after going through the OS and the respective affidavits filed by the applicant, I do not find that that the applicant has misled this court in any way and that the applicant has made full and frank disclosure of the entire circumstances of its case before this court which includes the applicant's financial status, the current legal proceedings against them, as well as addressing the intervener's objections to the OS.

[27] After considering the said documents and matters mentioned above in toto, I find that:

(a) there has been no objection to the OS by Alliance Bank and that the only objection to the OS comes from the intervener who is a minority creditor of the applicant;

(b) the recovery plans are supported by two of the applicant's largest creditors, Accupro Sdn Bhd and Bong Kian;

(c) the TNB Contracts has been absolutely assigned to Alliance Bank and accordingly the applicant will not be able to 'utilize its current funds from the ongoing operations of the company' as stated in the recovery plan;

(d) the DOA by the applicant to Alliance Bank and the Accupro DOA are essential to the business and the eventual rehabilitation of the applicant;

(e) the offers from the White Knights, namely Abadi Ria and ABE despite currently being conditional offers only, the placement of a cheque by Abadi Ria for the sum of RM1m is prima facie evidence of a firm commitment by Abadi Ria;

(f) there is a potential RM10m cash injection for the applicant from the unknown third party although it is currently only a conditional offer subject to a due diligence;

(g) there is a possibility of the purported availability of contracts in coming days from TNB as per the forecast from TNB although being currently speculative; and

(h) the applicant's cash flow is based on the applicant's operating capacity which will be stopped if the applicant stops operating and their cash flow impacted.

[28] Based on my findings above, I hold that the applicant has been able to satisfy this Court that the criteria's referred to s 405(1)(b) of the Companies Act 2016 being that the survival of the applicant company, or the whole or part of its undertaking as a going concern or a more advantageous realisation of the applicant company's assets would be effected than on a winding up, have been met on a balance of probabilities that it is more probable than not that the criterion as set out will be fulfilled, see *Spacious Glory Sdn Bhd v Coconut Three Sdn Bhd (previously known as Nexgram Land Sdn Bhd)* [2022] 7 MLJ 76; [2020] 1 LNS 1617.

Public interest

[29] For the sake of completeness, I have also taken into account the purported element of public interest put forth by the applicant which would be a consideration for this court to take into account by virtue of s 405(5)(a) of the Companies Act 2016, which reads:

> (5) Nothing in this section shall preclude a Court:
>
> (a) from making a judicial management order and appointing a judicial manager if the Court considers the public interest so requires.

[30] From the applicant's own admission, there are at least 12 companies in Malaysia who have the capacity to conduct a similar business as the applicant and this by itself would mean that the applicant is not only company in Malaysia who can manufacture medium and high voltage cable in Malaysia and that such business is therefore not exclusive to the applicant. The fact, as alleged by the applicant's counsel, that there will be less competitive biddings which would greatly affect the prices of cables and result in an increase of the

same which will eventually hurt the government of Malaysia is, with the greatest of respect, merely a conjecture and is totally unproven before this court.

[31] Although I agree with the cases of *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit* [2019] 8 MLJ 473; [2018] 10 CLJ 412 and *Re Biaxis (M) Sdn Bhd* [2020] MLJU 1188, where the courts have held that the element of public interest is an overriding factor to decide a judicial management application where the requisite criterias in s 405 of the Companies Act 2016 have not been met, I hold that the same is not applicable in the case before me due to my finding above that there is no element of public interest in the case before me.

DECISION

[32] In the circumstances, this Court is granting order in terms of the OS in encl 1 prayers (a), (b), (c), (d), (e)(i) – (vii), (f), (g), (h), (i) and (j) therein.

Order in terms of OS in encl 1 granted.

Reported by Nabilah Syahida Abdullah Salleh